

**BEFORE THE TENNESSEE REGULATORY AUTHORITY AT
NASHVILLE, TENNESSEE**

IN RE:	SEPTEMBER 20, 2001)	
)	
PETITION FOR AN INVESTIGATION AND/OR SHOW CAUSE ORDER TO DETERMINE JUST AND REASONABLENESS OF RATES CHARGED BY BELLSOUTH TELECOMMUNICATIONS, INC.)	DOCKET NO. 98-00021
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**ORDER DENYING AARP'S PETITION AND
CONSUMER ADVOCATE'S COMPLAINT OR PETITION TO INTERVENE**

This matter came before the Tennessee Regulatory Authority (the "TRA" or "Authority") at a regularly scheduled Authority Conference held on August 1, 2000. At that Conference the Directors considered the *Petition for an Investigation and/or Show Cause Order to Determine Just and Reasonableness of Rates Charged by BellSouth Telecommunications, Inc.* ("Petition") filed by the American Association of Retired Persons ("AARP") and the *Complaint or Petition* ("Complaint") filed by the Consumer Advocate Division of the Tennessee Attorney General's Office ("Consumer Advocate"). Upon reviewing the AARP's Petition and the Consumer Advocate's Complaint and considering the filings in this docket and the Tennessee Court of Appeals' decisions governing the TRA Docket No. 95-02614, the Directors voted unanimously to deny the AARP's Petition and the Consumer Advocate's Complaint.

Travel of This Case

On January 14, 1998, the AARP filed its Petition asking the Authority to convene a contested case to establish just and reasonable rates and eliminate alleged excess earnings

relating to the Tennessee operations of BellSouth Telecommunications, Inc. (“BellSouth”). In its Petition, the AARP relied, in part, on its own interpretation of the decisions of the Tennessee Court of Appeals, Middle Section, vacating the Order of the Tennessee Public Service Commission (“TPSC” or the “Commission”) in Docket No. 95-02614.¹ The AARP asserted that “consumers are entitled to protection under the ‘former regulatory statutes’ until a valid price regulation order is issued under the new law” and that the Court of Appeals specifically held that the TRA was permitted to regulate BellSouth under the “former regulatory statutes.”²

On February 12, 1998, BellSouth filed a *Motion to Dismiss* the AARP’s Petition. In moving to dismiss, BellSouth argued that the AARP’s Petition relies on the Court of Appeals’ November 19, 1997 decision denying petitions for rehearing in which the issue of the TRA conducting an earnings investigation of BellSouth was never raised.³ According to BellSouth,

Because the Court of Appeals held that the Commission could not conduct an earnings investigation of BellSouth under the guise of a price regulation audit, it is absurd to think that the Court “clarified” that the TRA could do so under rate of return regulation while BellSouth’s price regulation plan is tied up in the courts.⁴

The AARP filed an “Answer” to BellSouth’s *Motion to Dismiss* on April 24, 1998, stating that the Court’s decision “clarifies that the TRA has the power to exercise its authority under the former regulatory laws to protect consumers by setting just and reasonable rates

¹ *BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company v. H. Lynn Greer, et. al*, Appeal Nos. 01A01-9601-BC-00008, 01A01-9602-BC-00066, 01A01-9601-CH-00016, *Opinion*, (October 1, 1997) and *Order on Petition for Rehearing*, (November 19, 1997).

² *American Association of Retired Persons Petition for an Investigation and/or Show Cause Order to Determine Just and Reasonable Rates Charged by BellSouth Telecommunications, Inc.*, p. 4, (January 14, 1998). Relying on and quoting in part from the Court of Appeals’ November 19, 1997 Order on Petition for Rehearing at page 4: “As a result of our stay, BellSouth has continued to operate under the former regulatory statutes rather than the new statutes enacted in 1996.”

³ *BellSouth Telecommunications, Inc.’s Motion to Dismiss*, pp. 4-5, (February 12, 1998).

⁴ *Id.*, p. 6.

while this matter is tied up in the courts.”⁵ The AARP asserted that in being authorized to act under the former regulatory laws, the TRA has “the duty and responsibility to protect consumers until a valid price regulation plan is implemented.”⁶

On March 31, 1998, the Consumer Advocate filed its Complaint, alleging that BellSouth was charging more than reasonable and just rates for its service and that BellSouth was not operating pursuant to a price regulation plan.⁷ Further, the Consumer Advocate asserted that BellSouth was earning in excess of its authorized rate of return and that BellSouth should be placing its excess revenues into a deferred revenue account.⁸ On April 23, 1998, BellSouth filed a *Motion to Dismiss Consumer Advocate Division’s “Complaint or Petition.”* In addition to asserting that it was operating under price regulation, BellSouth contended that it was not subject to alternative reform regulation as alleged by the Consumer Advocate.⁹

At a regularly scheduled Authority Conference held on June 2, 1998, the Authority denied BellSouth’s *Motion to Dismiss* the AARP’s Petition and suspended further action in this docket until the Tennessee Supreme Court acted on the Authority’s Application for Permission to Appeal the Court of Appeals’ decision in the docket pertaining to BellSouth’s application for price regulation (Docket No. 95-02614).¹⁰ In determining to hold this matter in abeyance, the Authority determined that the AARP’s Petition must be considered in light of the decisions of the Tennessee Court of Appeals and that since the Application for Permission

⁵ *American Association of Retired Persons Answer to BellSouth Telecommunications, Inc.’s Motion to Dismiss*, p. 3, (April 24, 1998).

⁶ *Id.*, at pp. 6-7.

⁷ *Consumer Advocate Division of the Office of the Attorney General Complaint and Petition*, p. 2, (March 31, 1998).

⁸ *Id.*, pp. 4-6.

⁹ *BellSouth’s Motion to Dismiss Consumer Advocate Division’s “Complaint or Petition,”* p. 2, (April 23, 1998).

¹⁰ On January 20, 1998, the Authority and the Consumer Advocate filed an Application for Permission to Appeal with the Tennessee Supreme Court.

to Appeal was pending before the Tennessee Supreme Court, “it would be premature and against the notion of judicial economy to proceed with an earnings investigation at this time.”¹¹

On June 15, 1998, the Tennessee Supreme Court denied the Authority’s Application for Permission to Appeal. On June 29, 1998, the Court of Appeals issued its Mandate, directing the Authority to comply with the Court’s Judgment of October 1, 1997, which ordered the TRA to conduct further proceedings in TRA Docket No. 95-02614 consistent with the Court’s decision.

On July 6, 1998, the AARP filed an *Amended and Supplemental Petition of American Association of Retired Persons* (“Amended Petition”) requesting that the TRA enter an order requiring BellSouth to show cause why the TRA should not conduct an investigation into BellSouth’s earnings for the period from January 1, 1996 until the effective date of a price regulation plan or, in the alternative, treat the petition as a complaint, set the matter for hearing and designate a Hearing Officer.¹² The Amended Petition also requested that the Authority institute a rulemaking proceeding to determine which 3.01 Report should be used in implementing a price regulation plan.¹³ On July 13, 1998, AT&T Communications of the South Central States, Inc. (“AT&T”) filed a Petition for Leave to Intervene. On July 17, 1998, BellSouth filed a Response to the Amended Petition of AARP and AT&T’s Petition for Leave to Intervene. The Authority, at a regularly scheduled Authority Conference held on July 21, 1998, granted AT&T’s Petition to Intervene.¹⁴

¹¹ *Order Denying Motion to Dismiss; Holding Petition for an Earnings Investigation in Abeyance; and Holding Petition to Intervene in Abeyance*, p. 2, (August 7, 1998).

¹² *Amended and Supplemental Petition of American Association of Retired Persons*, p. 14, (July 6, 1998).

¹³ *Id.*, p. 13.

¹⁴ *Order Granting to AT&T Communications of the South Central States, Inc. Leave to Participate in Proceeding* (July 23, 1998).

Background of TRA Docket No. 95-02614¹⁵

On January 23, 1996, pursuant to Tenn. Code Ann. § 65-5-209, the TPSC entered an order implementing BellSouth's price regulation plan and requiring that BellSouth reduce its rates by approximately \$56,285,000. On February 14, 1996, BellSouth filed a Petition for Review of the TPSC's Order in the Court of Appeals for the Middle Section of Tennessee. BellSouth also filed a Motion to Stay the proposed rate reduction which was due to go into effect on March 1, 1996. On February 27, 1996, the Court of Appeals entered an Order staying the proposed rate reduction pending the resolution of the appeal, conditioned upon BellSouth's filing of a bond in the amount of \$10 million. On April 3, 1996, the Court entered a second order holding that the stay under its February 27, 1996 Order applied not only to the implementation of the reductions in BellSouth's rates but also to the implementation of BellSouth's price regulation plan.

On October 1, 1997, the Court of Appeals rendered its decision vacating the order of the TPSC and remanding the matter to the TRA to approve BellSouth's price regulation application. On November 19, 1997, the Court of Appeals issued its decision denying motions for rehearing and again directing the TRA to consider BellSouth's price regulation application. On January 20, 1998, the TRA and the Consumer Advocate Division filed in the Tennessee Supreme Court an Application for Permission to Appeal the Court of Appeals' decision. The Tennessee Supreme Court had not acted on this Application at the time the Authority determined on June 2, 1998, to hold the AARP Petition in abeyance.

Subsequent to the Authority's decision to hold the AARP's Petition in abeyance, the Supreme Court issued an order on June 15, 1998 denying the Application filed by the

¹⁵ Because the Authority determined that the AARP's Petition must be considered in light of the Court of Appeals' decision regarding TPSC Docket No. 95-02614, the background of that docket is relevant to the Authority's decision in this matter.

Authority and the Consumer Advocate. On July 1, 1998, the Court of Appeals issued its Mandate directing the TRA to implement the Court's decisions of October 1, 1997 and November 19, 1997.

On July 10, 1998, BellSouth filed a *Motion to Implement the Mandate* in TRA Docket No. 95-02614. Thereafter, the Authority considered Docket No. 95-02614 at its July 21, 1998 Authority Conference and requested interested parties to file responses to BellSouth's *Motion to Implement the Mandate*. By August 5, 1998, responses were submitted to the TRA by the Consumer Advocate, MCI Communications, Corp. ("MCI"), AT&T and the AARP. In addition, the Consumer Advocate filed a *Motion to Begin Afresh or Alternatively a Complaint or Petition* in Docket No. 95-02614 on July 22, 1998.

The Directors of the Authority considered BellSouth's *Motion to Implement the Mandate* and the Consumer Advocate's Motions at a Special Authority Conference held on October 27, 1998. During that Conference, the Directors deliberated on the merits of the pending motions as well as the appropriate disposition of the entire matter of Docket No. 95-02614 in light of the decisions of the Court of Appeals in *BellSouth v. Greer*, 972 S.W.2d 663 (Tenn. Ct. App. 1997). The Directors decided the case as a matter of law and, in complying with the Court of Appeals' Mandate, denied the Consumer Advocate's motions and granted BellSouth's *Motion to Implement Mandate*. The Authority's decision was memorialized in its Order of December 9, 1998 in TRA Docket No. 95-02614.

On February 8, 1999, the Consumer Advocate filed a Petition for Review with the Court of Appeals seeking a reversal of the Authority's Order of December 9, 1998. The Court issued its decision on January 10, 2000 affirming the Authority's Order.¹⁶ The

¹⁶ *Consumer Advocate Division, on Behalf of Tennessee Consumers and the Attorney General of Tennessee vs. Tennessee Regulatory Authority*, Appeal No. M1999-02151-COA-R12-CV, TPSC Docket No. 95-02614, (January 10, 2000).

Consumer Advocate filed a Petition to Re-Hear which was denied by the Court on February 11, 2000.¹⁷ No application for permission to appeal was filed in the Tennessee Supreme Court. On May 10, 2000, the Court of Appeals issued its Mandate to the Authority signifying the final resolution of TRA Docket No. 95-02614.¹⁸

Findings of Fact and Conclusions of Law

By its Order of December 9, 1998, the Authority approved BellSouth's petition for price regulation effective October 1, 1995. Because all appeals in Docket No. 95-02614 had been exhausted and the Order of December 9, 1998 had been upheld, it was appropriate for the Authority to once again address AARP's Petition and the Consumer Advocate's Complaint in this docket. At the Authority Conference held on August 1, 2000, after considering all of the filings, the Authority denied AARP's Petition and the Consumer Advocate's Complaint, based upon the following findings and conclusions:

1. The Authority found that the AARP's Petition was rendered moot as a result of the Court of Appeals' decision issued on January 10, 2000, which upheld the Authority's determination that BellSouth began operating under price regulation on October 1, 1995. The AARP Petition requested an investigation of BellSouth's earnings for the years 1996 and 1997. The AARP Petition acknowledged that the earnings review conducted by the TPSC in 1993 (TPSC Docket No. 93-13527) established rates for the three-year period beginning January 1, 1993 and concluding on December 31, 1995. BellSouth's 1995 earnings are not in question and are not the subject of the AARP's Petition. The Authority's decision establishing October 1, 1995 as the date on which BellSouth began operating under price

¹⁷ *Consumer Advocate Division, on Behalf of Tennessee Consumers and the Attorney General of Tennessee vs. Tennessee Regulatory Authority*, Appeal No. M1999-02151-COA-R12-CV, TRA Docket No. 95-02614, *Order on Petition to Rehear*, (February 11, 2000).

¹⁸ The Court of Appeals issued its Mandate to the Authority after the time expired for the filing of an application for permission to appeal the Tennessee Supreme Court.

regulation renders the AARP Petition moot because BellSouth was effectively under price regulation, not rate of return regulation, for the period that the AARP requested an earnings review.

2. The Authority concluded that conducting an earnings investigation for the period during which the application for price regulation was pending would be in contradiction of the price regulation statutes and in disregard of the decisions of the Court of Appeals. With the October 1, 1995 effective date established and upheld by the Court of Appeals, the Authority was not permitted to conduct a review of BellSouth's earnings. Neither would it have been proper to conduct an earnings review of BellSouth in 1998 when the AARP first filed its Petition.

3. The Authority found that approving the AARP Petition and the Consumer Advocate's Complaint would be inconsistent with the Authority's December 9, 1998 Order which has been upheld by the Court of Appeals. In establishing the effective date of BellSouth's price regulation plan, the Authority acted to place BellSouth in the position it would have been in had the approval by the TPSC not been in error. The Authority's December 9, 1998 Order stated:

Approving BellSouth's application for a price regulation plan with an effective date of October 1, 1995, is necessary to place BellSouth in the position that it would have been in had the Commission not erred, which is consistent with the Court of Appeals opinion. October 1, 1995 is the effective date that BellSouth had requested in its application filed on June 20, 1995 and would have been the effective date of BellSouth's plan had the Commission acted in accordance with Tenn. Code Ann. § 65-5-209.¹⁹

The Authority determined in its December 9, 1998 Order that, but for the errors found by the Court of Appeals, BellSouth would have been operating under a price regulation plan prior to

¹⁹ See TPSC Docket No. 95-02614, *Order Approving BellSouth Telecommunications, Inc.'s Application for Price Regulation Plan*, p. 19, (December 9, 1998).

January 1, 1996, either with or without rate adjustments. Approval of the AARP Petition would be inconsistent with this ruling by the Authority in TRA Docket No. 95-02614.

4. BellSouth was not operating under TRA Rule 1220-4-2-.55 in 1996 and 1997 as alleged by the Consumer Advocate. The Consumer Advocate fashioned its filing as a “Complaint or Petition to Intervene.” In that filing, the Consumer Advocate argued that BellSouth was still operating under the TPSC Regulatory Reform Plan (Rule 1220-4-2-.55) in 1996 and 1997 and that a portion of BellSouth’s earnings in excess of 11.85% should have been deposited into the deferred revenue account for distribution to ratepayers. The Authority found no support for the Consumer Advocate’s assertion that BellSouth was operating under the Regulatory Reform Plan in 1996 and 1997. Participation in the Regulatory Reform Plan was optional, not mandatory, for local exchange carriers. Although BellSouth did elect to participate in regulatory reform during the 1993-1995 earnings period, it is reasonable to conclude that BellSouth opted out of regulatory reform and rate of return regulation by filing for price regulation on June 20, 1995. Because Tenn. Code Ann. § 65-5-209 does not permit the Authority to deny an incumbent’s price regulation application, only to establish the incumbent’s rates upon entry into price regulation, it is simply not reasonable to conclude that BellSouth was opting to continue under regulatory reform.

5. A rulemaking proceeding is not necessary to determine which 3.01 Report to use when establishing the rates of a company upon entry into price regulation. Tenn. Code Ann. § 65-5-209 is explicit and unambiguous in requiring that “the most recent Tennessee Regulatory Authority 3.01 report” be used in evaluating rates upon entry into price regulation. Section 65-5-209 does not provide for a rulemaking proceeding. Further, promulgating a rule where the statute is explicit would be redundant and would serve no purpose.

Further, on July 21, 1998, in Docket No. 95-02614, the Authority provided interested parties the opportunity to file comments in advance of the Authority taking action on BellSouth's *Motion to Implement the Mandate*. Comments were submitted by the AARP, AT&T, MCI and the Consumer Advocate. The AARP's comments, filed on August 5, 1998, did not suggest that the "most recent 3.01" should be defined through a rulemaking. To the contrary, the AARP recommended that the Authority select the appropriate 3.01 Report in Docket No. 95-02614 as part of a contested case proceeding.²⁰ Indeed, none of the parties in Docket No. 95-02614 ever questioned the use of the 3.01 Report for March, 1995 until after the Court of Appeals vacated the TPSC's decision on other grounds.

6. The convening of a contested case in this docket is within the discretion of the Authority.²¹ The Authority concluded that the AARP and the Consumer Advocate have not demonstrated a legal or factual basis for approval of the relief sought in the Petition and the Complaint and therefore declined to convene a contested case in this matter. After reviewing the AARP's Petition and the Consumer Advocate's Complaint and the associated filings in this matter, the Directors voted unanimously to deny the AARP's Petition²² and the Consumer Advocate's Complaint.

IT IS THEREFORE ORDERED THAT:

1. The AARP's Petition for an Investigation and/or Show Cause Order of the Just and Reasonableness of the Rates of BellSouth Telecommunications, Inc. is denied.
2. The Complaint or Petition to Intervene of the Consumer Advocate is denied.

²⁰ See *American Association of Retired Persons Response to BellSouth Telecommunications, Inc.'s Motion to Implement Appellate Court's Mandate* (August 5, 1998), TRA Docket No. 95-02614.

²¹ See *Consumer Advocate Div. v. Greer*, 962 S.W.2d 759, 763 (Tenn. 1998), in which the Tennessee Supreme Court stated: "By granting the TRA power to investigate the General Assembly implicitly granted the TRA discretionary authority to determine, after investigation, whether a contested case hearing is warranted."

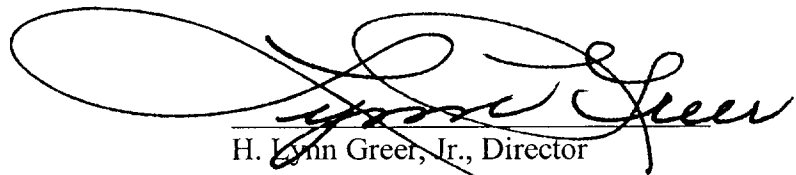
²² The Authority's findings and determination that the AARP's Petition be denied also disposes of the AARP's Amended Petition.

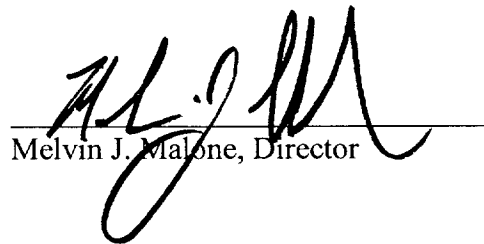
3. No further proceedings being necessary in this matter, this docket is hereby closed.

4. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order.

5. Any party aggrieved by the decision of the Tennessee Regulatory Authority may file a Petition for Review with the Tennessee Court of Appeals, Middle Division, within sixty (60) days of the date of entry of this Order.


Sara Kyle, Chairman


H. Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary